

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
JILL M. PIETRINI (Cal. Bar No. 138335)
3 jpietrini@sheppardmullin.com
PAUL A. BOST (Cal. Bar No. 261531)
4 pbost@sheppardmullin.com
BENJAMIN O. AIGBOBOH (Cal. Bar. No. 268531)
5 baigboboh@sheppardmullin.com
1901 Avenue of the Stars, Suite 1600
6 Los Angeles, California 90067-6055
Telephone: (310) 228-3700 / Facsimile: (310) 228-3701

7 Attorneys for Defendant and
8 Counterclaimant

9
10 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 BETWEEN THE LINES
13 PRODUCTIONS, LLC a California
limited liability company,

14 Plaintiff,

15 v.

16 LIONS GATE ENTERTAINMENT
17 CORP., a British Columbia corporation,
and SUMMIT ENTERTAINMENT,
18 LLC, a Delaware limited liability
company,

19 Defendants.

20
21
22
23 AND RELATED COUNTERCLAIMS.

Case No. 2:14-cv-00104-R (PJWx)

**DEFENDANT AND
COUNTERCLAIMANT SUMMIT
ENTERTAINMENT, LLC'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION *IN LIMINE* NO. 2 TO
EXCLUDE FINANCIAL REPORTS
BY NASH INFORMATION
SERVICES, LLC AND ANY
TESTIMONY THEREON**

Hon. Judge Manuel L. Real

Hearing Date: November 25, 2014
Time: 9:00 a.m.
Ctrm.: 8

Complaint filed: Dec. 16, 2013
Counterclaims filed: Jan. 27, 2014
Trial Date: Nov. 25, 2014

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. RELEVANT FACTS	2
A. BTL’s First Lawsuit Against Defendants	2
B. BTL’s Current Action Against Summit.....	3
III. SUMMIT’S MOTION <i>IN LIMINE</i> NO. 2 SHOULD BE GRANTED	6
A. Summit’s Motion Should Be Granted Because BTL Improperly Failed To Disclose Bruce Nash And His Financial Reports In Violation Of Fed.R.Civ.P. 26(a)(1)	6
1. BTL Failed To Disclose Mr. Nash In Violation Of Fed.R.Civ.P. 26(a)(1)(A)(i)	6
2. BTL Failed To Disclose The Nash Financial Reports In Violation Of Fed.R.Civ.P. 26(a)(1)(A)(iii)	8
B. Summit’s Motion Should Be Granted Because BTL Improperly Failed To Disclose Mr. Nash As An Expert In Violation Of Fed.R.Civ.P. 26(a)(2).....	12
1. Mr. Nash Is An Expert Witness Under Fed.R.Evid. 702	13
2. BTL’s Failure To Disclose Mr. Nash As An Expert Witness Is Not Substantially Justified Or Harmless	15
IV. CONCLUSION	17

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Allegro Ventures, Inc. v. Almquist</i>	
2014 U.S. Dist. LEXIS 64008 (S.D. Cal. May 8, 2014)	17
<i>Am. Family Mut. Ins. Co. v. Spectre W. Builders Corp.</i>	
2011 U.S. Dist. LEXIS 11328 (D. Ariz. Feb. 4, 2011)	13
<i>Am. Realty Trust, Inc. v. Matisse Partners, L.L.C.</i>	
2002 U.S. Dist. LEXIS 12560 (N.D. Tex. July 10, 2002)	11
<i>Carson Harbor Vill., Ltd. v. Unocal Corp.</i>	
2003 U.S. Dist. LEXIS 14438 (C.D. Cal. Aug. 8, 2003)	12
<i>Crime, Justice & Am., Inc. v. Smith</i>	
2014 U.S. Dist. LEXIS 141388 (E.D. Cal. Oct. 2, 2014)	13, 14
<i>Emmpresa Cubana del Tabaco v. Culbro Corp.</i>	
213 F.R.D. 151 (S.D.N.Y. 2003)	16
<i>Equal Employment Opportunity Commission v. GLC Restaurants, Inc.</i>	
2007 U.S. Dist. LEXIS 399 (D. Ariz. Jan. 4, 2007)	11
<i>Frontline Med. Assocs., Inc. v. Coventry Health Car</i>	
263 F.R.D. 567 (C.D. Cal. 2009)	9
<i>Gerawan Farming, Inc. v. Prima Bella Produce, Inc.</i>	
2011 U.S. Dist. LEXIS 52792 (E.D. Cal. May 17, 2011)	12, 13
<i>Estate of Gonzalez v. Hickman</i>	
2007 U.S. Dist. LEXIS 84390 (C.D. Cal. June 28, 2007)	9, 11, 16
<i>Hoffman v. Constr. Protective Servs., Inc.,</i>	
541 F.3d 1175 (9th Cir. 2008)	12
<i>Humboldt Baykeeper v. Union Pac. R.R. Co.</i>	
2010 U.S. Dist. LEXIS 52182 (N.D. Cal. May 27, 2010)	15
<i>Internet Servs. LLC v. Immersion Corp.</i>	
2008 U.S. Dist. LEXIS 120563 (N.D. Cal. May 13, 2008)	16

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<i>Jackson v. Am. Family Mut. Ins. Co.</i> 2012 WL 845646 (D. Nev. Mar. 12, 2012).....	7
<i>Jiminez v. Reno</i> 2007 WL 1462798 (C.D. Cal. 2007)	7
<i>Mariscal v. Graco, Inc.</i> 2014 U.S. Dist. LEXIS 120182 (N.D. Cal. Aug. 27, 2014).....	11
<i>NutraSweet Co. v. X-L Eng’g Co.</i> 227 F.3d 776 (7th Cir. 2000)	16
<i>Ollier v. Sweetwater Union High Sch. Dist.</i> 2014 U.S. App. LEXIS 18020 (9th Cir. Sept. 19, 2014).....	7
<i>Patterson v. Balsamico</i> 440 F.3d 104 (3d Cir. 2006)	7
<i>R&R Sails, Inc. v. Ins. Co. of the State of Pa.</i> 673 F.3d 1240 (9th Cir. 2012)	7
<i>Therapeutics, Inc. v. Foley & Lardner, LLP</i> 2008 U.S. Dist. LEXIS 51171 (S.D. Cal. July 2, 2008).....	13
<i>Toyrrific, LLC v. Karapetian</i> 2013 U.S. Dist. LEXIS 54043 (C.D. Cal. Apr. 16, 2013).....	9, 11
<i>Tyco Thermal Controls, Inc. v. Redwood Industrials, LLC</i> 2012 U.S. Dist. LEXIS 91598 (N.D. Cal. June 29, 2012)	16
<i>Ventra v. U.S.</i> 121 F. Supp.2d 326 (S.D.N.Y. 2000)	8
<i>Wong v. Regents of the Univ. of Cal.</i> 410 F.3d 1052 (9th Cir. 2005)	17
<i>Yeti by Molly, Ltd. v. Deckers Outdoor Corp.</i> 259 F.3d 1101 (9th Cir. 2001)	16
<u>Statutes</u>	
28 U.S.C. § 1404.....	2

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<u>Other Authorities</u>	
Fed.R.Civ.P. 26(a)	6
Fed.R.Civ.P. 26(a)(1)(A)(i)	7
Fed.R.Civ.P. 26(a)(1)(A)(iii)	9
Fed.R.Civ.P. 26(a)(2)(A)	12
Fed.R.Civ.P. 26(a)(2)(B)	12
Fed.R.Civ.P. 26(a)(2)(D)	12
Fed.R.Civ.P. 37(c)(1).....	7, 12
Fed.R.Evid. 702	13

1 **I. INTRODUCTION**

2 At 11:52 p.m. PST on October 6, 2014 – the discovery cut-off – Plaintiff and
 3 Counter-Defendant Between the Lines Productions, LLC (“BTL”) disclosed Bruce
 4 Nash of Nash Information Services, LLC for the first time in this case. Four
 5 business day before that, BTL, in opposition to Summit’s motion for summary
 6 adjudication and again for the first time, produced “financial estimates” prepared by
 7 Mr. Nash that BTL claims support its demand for more than \$6 million in damages.
 8 Despite the fact that BTL did not identify Mr. Nash as an expert witness in its
 9 witness list, the documents make it clear that Mr. Nash’s purported testimony is
 10 expert testimony. It is undisputed that BTL never disclosed Mr. Nash (as a lay or
 11 expert witness) or the financial estimates prepared by him pursuant to Fed.R.Civ.P.
 12 26.

13 Fed.R.Civ.P. 26 requires parties to disclose information on which they intend
 14 to rely, including all documents and information supporting their damages
 15 calculations. Failure to do so is grounds for automatic exclusion of the undisclosed
 16 evidence, unless the party that failed to disclose can establish that its failure to
 17 comply with Fed.R.Civ.P. 26 was substantially justified or harmless.

18 BTL has no justification for its failure to disclose Mr. Nash or his financial
 19 reports relating to BTL’s purported damages. The only plausible explanation is that
 20 BTL hoped its failure to disclose Mr. Nash and his financial reports (which are in
 21 effect expert reports) would prejudice Defendant and counterclaimant Summit
 22 Entertainment, LLC (“Summit”), which is in line with BTL’s conduct in this action
 23 and the previous action against Defendants¹ that it voluntarily dismissed. (*See, e.g.*,
 24 Dkt. 66 at 5-10 (denying BTL’s motion to amend, finding that there was ‘no other
 25 explanation [for its motion] than bad faith...to unnecessarily drag out these
 26

27 ¹ Defendant Lions Gate Entertainment Corp. (“Lions Gate”) was dismissed on
 28 October 20, 2014 from this case on summary judgment. (Dkt. 95.)

proceedings’ and that ‘BTL is only attempting in bad faith to increase the cost of litigation to Defendants.’”). Nor can BTL establish that its failure to disclose Mr. Nash or his financial reports was harmless. Summit has not been able to depose Mr. Nash or hire, consult and/or disclose its own experts about Mr. Nash and the financial estimates contained in Mr. Nash’s reports.

Accordingly, the Court should grant Summit’s motion and preclude the introduction of Mr. Nash’s financial reports and any testimony relating to such reports at trial.

II. RELEVANT FACTS

A. BTL’s First Lawsuit Against Defendants

On May 28, 2013, BTL filed a 219-page “Anti-Trust Complaint” (1,300+ pages with exhibits) against Summit and Lions Gate in the Southern District of New York, Case No. 1:13-cv-03584-JSR, asserting the following claims: (1) declaratory judgment that *Twiharder* constituted a fair use of the *Twilight* Motion Pictures; (2) violation of the Digital Millennium Copyright Act (“DMCA”); (3) violation of the Sherman Antitrust Act; and (4) cancellation of certain of Summit’s TWILIGHT trademark registrations (the “First Lawsuit”). (Dkt. 71-5, ¶ 41.)

On June 28, 2013, Defendants filed a motion to transfer the First Lawsuit to the Central District of California pursuant to 28 U.S.C. § 1404. (Dkt. 71-5 ¶ 42.) On July 30, 2013, Judge Jed Rakoff of the Southern District of New York granted Defendants’ motion to transfer, and the First Lawsuit was transferred and assigned to the Hon. Margaret M. Morrow. (Dkt. 71-5 ¶ 43.)

On August 2, 2013, BTL served its “Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1)” in the First Lawsuit. (Bost. Decl. ¶ 2, Ex. A.) In its initial disclosures in the First Lawsuit, BTL disclosed 25 witnesses. (*Id.*) Neither Bruce Nash nor Nash Information Services was disclosed. (*Id.*) In its initial disclosures, BTL stated that it was seeking approximately \$125,000,000 in compensatory damages, treble damages in the amount of \$375,000.000, disgorgement of Summit’s

1 profits earned from each of the *Twilight* motion pictures, interest and attorneys' fees.
2 (*Id.*)

3 After the First Lawsuit was transferred, Defendants filed a motion to dismiss
4 BTL's antitrust, trademark cancellation, and DMCA claims. (Dkt. 71-5 ¶ 44.) BTL
5 did not defend the merits of these claims but, rather, filed a 186-page First Amended
6 Complaint pursuant to FRCP 15(a)(1)(B), in which it voluntarily dismissed its
7 trademark cancellation and DMCA claims, but continued to assert its antitrust and
8 declaratory judgment claims. (Dkt. 71-5 ¶ 45.) Defendants filed a second motion to
9 dismiss on October 22, 2013, which again sought dismissal of BTL's antitrust claim,
10 and set the hearing for December 2, 2013. BTL never filed an opposition. (Dkt. 71-
11 5 ¶ 46.) Instead, BTL launched a series of vexatious and meritless filings disputing,
12 among other things, the impartiality of Judge Morrow and accusing her of filing
13 "counterfeit" orders. (Dkt. 71-5 ¶ 47.) BTL also refused to comply with its
14 discovery obligations, forcing Summit to file a motion to compel. (Dkt. 71-5 ¶ 47.)

15 Ultimately, while Defendants' motion to compel was pending, and after each
16 of BTL's meritless filings was denied, BTL voluntarily dismissed the First Lawsuit
17 without prejudice pursuant to FRCP 41(a)(1) on December 13, 2013, the day its
18 opposition to Defendants' second motion to dismiss was due. (Dkt. 71-5 ¶ 48.)

19 **B. BTL's Current Action Against Summit**

20 The very next business day, December 16, 2013, BTL re-filed its lawsuit –
21 the present action – once again in the Southern District of New York (the "Second
22 Lawsuit"). (Dkt. 71-5 ¶ 50.) BTL did not include any antitrust claims it allegedly
23 had against Defendants in the Second Lawsuit. On January 6, 2014, Judge Rakoff
24 *sua sponte* transferred the action – again – to the Central District of California.
25 (Dkt. 71-5 ¶ 51.) Despite BTL's refusal to serve Defendants with a copy of its
26 Complaint, Defendants, on January 27, 2014, filed their Answer and Summit's
27 Counterclaims. (Dkt. 71-5 ¶ 52.)

1 On March 10, 2014, BTL filed an untimely (and, ultimately, entirely
2 unmeritorious) motion to dismiss Summit's Counterclaims. (Dkt. 71-5 ¶ 53.) On
3 June 25, 2014, BTL filed its Answer to Summit's Counterclaims. (Dkt. 71-5 ¶ 54.)

4 On July 16, 2014, BTL served its "Initial Disclosures Pursuant to Fed. R. Civ.
5 P. 26(a)(1)" in the Second Lawsuit. (Bost Decl. ¶ 3, Ex. B.) In its initial disclosures
6 in the Second Lawsuit, BTL disclosed 15 witnesses. Again, Bruce Nash nor Nash
7 Information Services was disclosed. (*Id.*) In its initial disclosures in the Second
8 Lawsuit, BTL stated that it was seeking approximately \$13,300,00 in compensatory
9 damages, treble damages for "Antitrust," disgorgement of Defendants' profits
10 earned from the motion picture *Breaking Wind*, interest and attorneys' fees. (*Id.*)
11 BTL asserted that its \$13,300,000 in compensatory damages was based on:

- 12 1. Recovery of Lost Profits, measured by revenues of comparable
13 feature-length motion pictures parodies, e.g., *Breaking Wind* (2012).
- 14 2. Recovery for Foreseeable Loss of Business opportunities[.]
- 15 3. Recovery for Injury to Business Reputation / Goodwill[.]

16 (*Id.*)

17 BTL did not disclose how it calculated its \$13,300,000 demand or produce
18 any documentation on which its calculation was based (*id.*) even though BTL is
19 required to do under FRCP 26. BTL did not amend or supplement its initial
20 disclosures in this case. (*Id.*) Nor did BTL serve any expert disclosures or expert
21 reports in this case. (*Id.*)

22 On August 1, 2014, BTL filed a motion for leave to amend and, on August
23 18, 2014, BTL filed its 135-page proposed First Amended Complaint. (Dkt. 71-5
24 ¶ 55.)

25 On August 28, 2014, the Court issued its "Order (in Chambers) Setting
26 Pre-Trial & Trial Dates," and setting: (1) October 6, 2014 as the deadline to file and
27 serve memoranda of contentions of fact and law, exhibit lists and witness lists and
28 the discovery cut-off; (2) October 27, 2014 as the deadline to lodge the pre-trial

1 conference order; (3) November 3, 2014 as the date for the pre-trial conference; and
2 (4) November 25, 2014 as the first date for trial.

3 On September 15, 2014, the Court issued an Order Denying Plaintiff's
4 Motion for Leave to file an Amended Complaint. In the Order, the Court found that,
5 in the First Lawsuit, BTL had "refused to comply with discovery," "filed a series of
6 vexatious and meritless filings" and voluntarily dismissed the First Lawsuit
7 "ostensibly to avoid an adverse ruling" on Defendants' motion to dismiss BTL's
8 antitrust claims. The Court also found that, in the Second Lawsuit, BTL had acted
9 in bad faith to "unnecessarily drag out these proceedings" and "to increase the costs
10 of litigation to Defendants." (Dkt. 71-5 ¶ 56.)

11 On October 6, 2014, at 11:52 p.m. PST – 8 minutes before the close of
12 discovery and 7 weeks before trial – BTL filed its witness list. (Bost Decl. ¶ 4, Ex.
13 C.) BTL disclosed 32 witnesses it intends to call at trial, 19 of whom were not
14 disclosed in BTL's or Summit's Rule 26 disclosures. (Dkt. 84; Bost Decl. ¶ 2 Ex.
15 B.) This was the first time that Bruce Nash and Nash Information Services were
16 disclosed by BTL. BTL did not disclose Mr. Nash as an expert, and treated him as a
17 third-party witness, stating that he should be contacted directly, and not through
18 BTL's counsel. (Dkt. 84 at 3:2-4.)

19 At the same time, BTL filed its proposed exhibit list. (Dkt. 85.) In it, BTL
20 identified, the following proposed exhibits, which appear to relate to, or be created
21 by, Mr. Nash:

Ex. No.	Description
41	<u>Nash Information Services, LLC</u> (Samples, Projection Guides)
42	<u>Nash Information Services, LLC</u> (Invoices, Fees)
43	<u>Nash Information Services, LLC</u> (Correspondence with BTLP)
44	<u>Nash Information Services, LLC</u> (FIRST_Sales Analysis – Twiharder v3.xls)

Ex. No.	Description
45	<u>Nash Information Services, LLC</u> (SECOND_Low Budget Releases.xls)
46	<u>Nash Information Services, LLC</u> (THIRD_Extra Comps.xls)
47	<u>Nash Information Services, LLC</u> (FOURTH_Sales Analysis_Low Budget Films.xls)
48	<u>Nash Information Services, LLC</u> (FIFTH_Sales Analysis – To Date Estimates.xls)

(Dkt. 85 at 5:16-6:10.)²

On October 13, 2014, BTL filed the parties’ joint exhibit list, and provided identical descriptions for Exhibit Nos. 41-48. (Dkt. 89 at 40:10-27.) Exhibits 41-48 (and any other documents found to relate to Mr. Nash) are referred to collectively as the “Nash Financial Reports.”)

III. SUMMIT’S MOTION *IN LIMINE* NO. 2 SHOULD BE GRANTED

A. Summit’s Motion Should Be Granted Because BTL Improperly Failed To Disclose Bruce Nash And His Financial Reports In Violation Of Fed.R.Civ.P. 26(a)(1)

1. BTL Failed To Disclose Mr. Nash In Violation Of Fed.R.Civ.P. 26(a)(1)(A)(i)

Even if treated as a lay witnesses (he should not be), Mr. Nash should be excluded because BTL failed to timely disclose him pursuant to Fed.R.Civ.P. 26(a)(1)(A)(i).

As is discussed in Summit’s Motion *in Limine* No. 1, parties to a lawsuit must disclose evidence in support of their claims and defenses. Fed.R.Civ.P. 26(a). This duty to disclose includes the duty to disclose the names, addresses, telephone

² BTL identified Exhibit 49 as “Master_Limited Release.xls (Composite Work).” (Dkt. 85 at 6:11-12.) It is not clear what this refers to or who prepared it. To the extent it was prepared by Mr. Nash, at his direction or with his assistance, it should be excluded for the reasons identified herein.

1 numbers, and subjects of information known for each individual likely to have
2 discoverable information on which the disclosing party may rely. Fed.R.Civ.P.
3 26(a)(1)(A)(i). This allows the other parties to determine whether to seek discovery
4 from such witnesses and to contact them and perhaps serve deposition or trial
5 subpoenas on them. *Ollier v. Sweetwater Union High Sch. Dist.*, 2014 U.S. App.
6 LEXIS 18020, at *36 (9th Cir. Sept. 19, 2014). As such, failure to timely and
7 properly disclose witnesses, without substantial justification, is grounds for their
8 exclusion at trial. Fed.R.Civ.P. 37(c)(1).³ BTL cannot seriously argue that it just
9 learned of Mr. Nash and his financial reports. Indeed, BTL has known about
10 Mr. Nash for more than a year before filing its witness list.

11 BTL disclosed Bruce Nash of Nash Information Services, LLC witness list
12 filed on October 6, 2014. BTL did not disclose Mr. Nash before October 6, 2014
13 (Bost Decl. ¶ 3, Ex. B) or identify the subject matter or scope of Mr. Nash's
14 purported testimony in its witness list. (Dkt. 84 at 3:2-4.) Documents attached to
15 BTL's opposition to Defendants' motion for summary adjudication – which BTL
16 filed four business days before the discovery cut-off – suggest that Mr. Nash will
17 testify to support BTL's claim for \$6.5 million in damages and establish that BTL
18 has been in communication with Mr. Nash about this matter and his purported

19
20 ³ See also *R&R Sails, Inc. v. Ins. Co. of the State of Pa.*, 673 F.3d 1240, 1246
21 (9th Cir. 2012) (Rule 37(c)(1) “forbid[s] the use at trial of any information required
22 to be disclosed by Rule 26(a) that is not properly disclosed.”) (citation and quotation
23 omitted); *Patterson v. Balsamico*, 440 F.3d 104, 118 (3d Cir. 2006) (affirming the
24 district court's order precluding belatedly-identified witnesses from testifying at
25 trial); *Jackson v. Am. Family Mut. Ins. Co.*, 2012 WL 845646, at **3-4 (D. Nev.
26 Mar. 12, 2012) (excluding testimony of plaintiff's “untimely disclosed” witnesses—
27 which witnesses were disclosed on the last day of the discovery cut-off—and
28 finding that “[a] trial court's case management efforts will be successful only if the
deadlines are taken seriously by the parties, and the best way to encourage that is to
enforce the deadlines”); *Jiminez v. Reno*, 2007 WL 1462798, at *2-3 (C.D. Cal.
2007) (precluding witnesses from testifying at trial who defendants—without
justification—had failed to timely disclose in initial or supplemental disclosures).

1 financial estimates since at least July 2013 – a year before BTL served its FRCP 26
2 initial disclosures in the Second Lawsuit and nearly 15 months before BTL
3 improperly identified Mr. Nash in its witness list. (Dkt. 75-33, 78 at 3:21-26.) This
4 is the only evidence BTL has introduced to support its claim for millions of dollars
5 in damages. There is no justification for BTL’s failure to disclose Mr. Nash and his
6 report for more than a year and mere minutes before the close of discovery. It
7 appears that BTL intentionally withheld information about Mr. Nash and his report
8 – the only evidence BTL has to support its preposterous demand for millions of
9 dollars – in an attempt to deny Defendants a chance to depose Mr. Nash and to
10 discredit his baseless conclusions. This is precisely the type of conduct that
11 Fed.R.Civ.P. 26 and 37 are intended to eliminate. *Ventra v. U.S.*, 121 F. Supp.2d
12 326, 332 (S.D.N.Y. 2000) (“The purpose of [Rule 37] is to prevent the practice of
13 ‘sandbagging’ an adversary with new evidence.”).

14 In short, BTL never disclosed Mr. Nash in any FRCP 26 disclosures, and
15 identified him for the first time in its witness list that was filed eight minutes before
16 the close of discovery. For the reasons set forth in Summit’s Motion *in Limine* No.
17 1 and above, BTL should be precluded from introducing Mr. Nash’s testimony at
18 trial.

19 **2. BTL Failed To Disclose The Nash Financial Reports In**
20 **Violation Of Fed.R.Civ.P. 26(a)(1)(A)(iii)**

21 BTL seeks \$13.3 million in compensatory damages for its claim for prima
22 facie tort. Other than conclusory statements in its initial disclosures, BTL did not
23 provide any basis or support for its \$13 million demand until mere days before the
24 discovery cut-off. In its opposition to Summit’s motion for summary adjudication,
25 BTL, for the first time, disclosed that its demand was purportedly supported by
26 “financial estimates from Nash Communications, LLC [*sic*], a leading third party
27 movie industry research firm based in Los Angeles, California.” (Dkt. 78 at 3:21-
28 25. BTL attached documents from Nash Information Services, LLC and Mr. Nash,

1 which appear to be those listed by BTL as Exhibit Nos. 41-48. (Dkt. 75-33.)
2 Because these documents purportedly support BTL's damages calculation, and BTL
3 failed to properly disclose them, the Nash Financial Reports must be excluded under
4 Fed.R.Civ.P. 37.

5 Pursuant to Fed.R.Civ.P. 26(a), a party must disclose:

6 computation of each category of damages claimed by the disclosing
7 party—who must also make available for inspection and copying as
8 under Rule 34 the documents or other evidentiary material, unless
9 privileged or protected from disclosure, on which each computation is
based, including materials bearing on the nature and extent of injuries
suffered.

10 Fed.R.Civ.P. 26(a)(1)(A)(iii); *see also Toyrrific, LLC v. Karapetian*, 2013 U.S. Dist.
11 LEXIS 54043, at *8 (C.D. Cal. Apr. 16, 2013) (pursuant to FRCP 26, parties must
12 disclose damages calculation and support “of their own volition and without being
13 compelled.”). FRCP 26 “requires a computation [of claimed damages], supported
14 by documents.” *Frontline Med. Assocs., Inc. v. Coventry Health Car*, 263 F.R.D.
15 567, 569 (C.D. Cal. 2009). Where a plaintiff claims lost profits, to comply with
16 Fed.R.Civ.P. 26, it must provide “information reasonably available to it as to gross
17 revenues, expense and any other component of its lost profits computation.” *Id.* at
18 570. Exclusion of undisclosed damages information or documents is automatic
19 unless the party facing sanctions can prove that its failure to disclose was either
20 justified or harmless. *Estate of Gonzalez v. Hickman*, 2007 U.S. Dist. LEXIS
21 84390, at **7-8 (C.D. Cal. June 28, 2007). Exclusion is warranted “even when a
22 litigant's entire cause of action will be precluded.” *Toyrrific*, 2013 U.S. Dist.
23 LEXIS 54043, at **8-9 (citing *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d
24 1175, 1180 (9th Cir. 2008)). BTL cannot meet its burden of establishing
25 justification or harmlessness. Therefore, Mr. Nash's Financial Reports should be
26 excluded.

27 BTL did not disclose any of the Nash Financial Reports until September 30,
28 2014 – four business days before the close of discovery – when it filed its opposition

1 to Summit's motion for summary adjudication. (Dkt. 75-33, 78 at 3:21-26.) It is
2 clear from the documents themselves that BTL has been in possession of the Nash
3 Financial Reports – including the financial estimates BTL now uses to support its
4 claim for \$13.3 million in damages – **since at least July 2013**, which is six months
5 before BTL filed the Second Lawsuit, a year before BTL served its initial
6 disclosures in the Second Lawsuit, and nearly 15 months before the close of
7 discovery. BTL has no justification for its failure to properly disclose its damages
8 calculation and support therefor.

9 BTL's failure to comply with Fed.R.Civ.P. 26 substantially prejudices
10 Summit. BTL did not "disclose" Mr. Nash or the Nash Financial Reports until four
11 business days before the close of discovery, and while Summit were preparing its
12 reply brief in support of its motion for summary adjudication, witness list, exhibit
13 list, and memorandum of contentions of law and fact, all of which were due on
14 October 6, 2014 (the close of discovery). Even if Summit were not engaged in
15 preparing numerous Court filings, it would still have been significantly prejudiced
16 as there was no possible way for it to prepare for and depose Mr. Nash about the
17 Nash Financial Reports before the discovery cut-off or trial.⁴ Furthermore, by
18 failing to disclose the Nash Financial Reports until mere days before the close of
19 discovery and after the deadline to disclose experts had passed, BTL made it
20 impossible for Summit to designate its own expert(s) to rebut the information and
21 conclusions contained in the Nash Financial Reports. Courts routinely exclude
22 damages calculations and the documents purportedly supporting them in similar

23
24 ⁴ BTL has not identified Mr. Nash as an expert. As is clear from the nature of
25 the Nash Financial Reports, Mr. Nash's testimony is expert testimony under
26 Fed.R.Evid. 702. However, given BTL's position that Mr. Nash is not an expert,
27 but instead a third-party lay witness, Summit would have had to subpoena Mr. Nash
28 to testify, which it could not do mere days before the discovery cut-off. Even if
Summit could get Mr. Nash served with a subpoena in four days, the subpoena
would be subject to a motion to quash by Mr. Nash for lack of reasonable notice.

1 circumstances. *See, e.g., Estate of Gonzalez*, 2007 U.S. Dist. LEXIS 84390, at
2 **15-16:

3 [T]he Estate's claim for economic damages, based on Gonzalez's lost
4 earning potential, depends both on undisclosed documentary evidence
5 of past earnings and on assumptions regarding his future work life....
6 It depends as well on appropriate discounting of any future earnings to
7 present value. Defendants were entitled to know plaintiffs'
8 assumptions concerning these various computational criteria, to test
9 them through discovery aimed at the relevant underlying factors..., and
10 to rebut them by retaining an expert who could opine on Gonzalez's
11 potential future earnings and the appropriate discount rate. Plaintiffs'
12 failure to disclose the Estate's damages calculation precluded
13 Defendants from taking the necessary discovery and obtaining an
14 appropriate expert opinion. This warrants exclusion of lost earnings
15 evidence under Rule 37(c)(1).⁵

11 ⁵ *See also Mariscal v. Graco, Inc.*, 2014 U.S. Dist. LEXIS 120182, at **5-6
12 (N.D. Cal. Aug. 27, 2014) (excluding evidence or testimony related to damages
13 claim because the plaintiff failed to comply with Fed.R.Civ.P. 26, which "denied
14 Defendant the opportunity to adequately conduct discovery and prepare a defense on
15 this claim."); *Toyrrific*, 2013 U.S. Dist. LEXIS 54043, at *8-9 (excluding damages
16 where "[l]ate disclosure of damages requires the Court to create a new briefing
17 schedule and re-open discovery" because "[s]uch modifications to the Court's and
18 the parties' schedules are not 'harmless'"); *Equal Employment Opportunity*
19 *Commission v. GLC Restaurants, Inc.*, 2007 U.S. Dist. LEXIS 399, at **29-30 (D.
20 Ariz. Jan. 4, 2007) ("As a general matter, disclosing a computation of damages
21 under Rule 26(a) is necessary for the opposing party to produce responding
22 evidence, such as an expert report. The Court cannot conclude that Plaintiffs'
23 failure to disclose a computation of damages...was harmless. Thus, pursuant to
24 Rule 37(c)(1), Plaintiffs will be prevented from presenting at trial any computation
25 of damages...required by Rule 26(a)(1)(C)."); *Am. Realty Trust, Inc. v. Matisse*
26 *Partners, L.L.C.*, 2002 U.S. Dist. LEXIS 12560, at **16-18 (N.D. Tex. July 10,
27 2002) ("All of the events giving rise to the plaintiffs' claims in this case occurred
28 nearly two years ago, and the information necessary to make a calculation of their
damages is within the plaintiffs' sole possession. The court finds that the plaintiffs
made a tactical decision to ambush the defendants by withholding their main claim
for damages until after the close of discovery.... [T]he plaintiffs here had all of the
necessary facts to disclose their damage theory months ago, and they have never
provided proper support for their damage calculations. Therefore, for all of the
reasons discussed, the court grants the defendants' motion to exclude the plaintiffs'
evidence of damages arising from securities liquidated due to margin calls.").

B. Summit's Motion Should Be Granted Because BTL Improperly Failed To Disclose Mr. Nash As An Expert In Violation Of Fed.R.Civ.P. 26(a)(2)

In addition to the disclosures of lay witnesses required by Fed.R.Civ.P. 26(a)(1), a party must disclose the identity of any expert witnesses it may use at trial. Fed.R.Civ.P. 26(a)(2)(A). If the expert was retained or employed to provide expert testimony in the case, the disclosure must be accompanied by a written expert report. Fed.R.Civ.P. 26(a)(2)(B). This report must include: (1) "a complete statement of all opinions the witness will express and the basis and reasons for them"; (2) "the facts or data considered by the witness in forming them"; (3) "any exhibits that will be used to summarize or support them"; (4) "the witness's qualifications, including a list of all publications authored in the previous 10 years"; (5) "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (6) "a statement of the compensation to be paid for the study and testimony in the case." *Id.* Absent stipulation or of court order, expert witness disclosures must be made at least 90 days before trial. Fed.R.Civ.P. 26(a)(2)(D).

A party that fails to disclose its experts and their reports should be barred from introducing either, unless the failure to disclose was "substantially justified" or "harmless." Fed.R.Civ.P. 37(c)(1). FRCP 37(c)(1) "gives teeth" to the disclosure requirements "by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (citation and quotation omitted). Thus, "[e]xcluding expert evidence as a sanction for failure to disclose expert witnesses in a timely fashion is automatic and mandatory unless the party can show the violation is either justified or harmless." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 2003 U.S. Dist. LEXIS 14438, at *7 (C.D. Cal. Aug. 8, 2003) (internal quotations and citation omitted); *see also Gerawan Farming, Inc. v. Prima Bella Produce, Inc.*, 2011 U.S. Dist. LEXIS 52792, at *10 (E.D. Cal. May 17, 2011)

1 (“Exclusion of improperly disclosed expert witnesses is ‘self-executing...and
2 automatic to provide a strong inducement for disclosure of material....’”) (quoting
3 *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)).
4 “[T]he burden falls on the party facing the sanction to demonstrate that its expert
5 witness should not be excluded under Rule 37(c)(1).” *Gerawan Farming*, 2011 U.S.
6 Dist. LEXIS 52792, at *11; *see also Am. Family Mut. Ins. Co. v. Spectre W.*
7 *Builders Corp.*, 2011 U.S. Dist. LEXIS 11328, at *9 (D. Ariz. Feb. 4, 2011).

8 There can be no doubt that Mr. Nash’s purported testimony falls squarely
9 within Fed.R.Evid. 702. BTL should have disclosed him pursuant to Fed.R.Civ.P.
10 26(a)(2). It failed to do so, and cannot meet its burden of establishing justification
11 or harmless. BTL should be precluded from calling Mr. Nash at trial.

12 **1. Mr. Nash Is An Expert Witness Under Fed.R.Evid. 702**

13 An expert witness is one who, “by knowledge, skill, experience, training or
14 education,” may provide testimony in the form of opinion if “the expert’s scientific,
15 technical or other specialized knowledge will help the trier of fact,” the testimony is
16 based on sufficient facts or data, and the testimony is the product of reliable
17 methods reasonably applied to the facts of the case. Fed.R.Evid. 702. In short, an
18 expert witness is one that “employ[s] specialized knowledge in [his or her]
19 testimony.” *Crime, Justice & Am., Inc. v. Smith*, 2014 U.S. Dist. LEXIS 141388, at
20 *9 (E.D. Cal. Oct. 2, 2014) (contrasting a lay opinion, which “is rationally based on
21 the witness’s perception and not based on scientific, technical, or other specialized
22 knowledge.”). A party cannot avoid its Fed.R.Civ.P. 26(a)(2) disclosure
23 requirements or the requirements of Fed.R.Evid. 702 “through the simple expedient
24 of proffering an expert in lay witness clothing.” *Therapeutics, Inc. v. Foley &*
25 *Lardner, LLP*, 2008 U.S. Dist. LEXIS 51171, at *6 (S.D. Cal. July 2, 2008).

26 There can be no dispute that Mr. Nash’s proposed testimony is based on his
27 specialized knowledge, not on his rational perception of the facts at issue. Mr. Nash
28 is not a percipient witness. He did not witness any of the conduct that gives rise to

1 BTL's claims. In fact, based on the Nash Financial Reports, it does not appear that
2 Mr. Nash ever even viewed the *Twiharder* film. Mr. Nash was retained by BTL
3 after it filed the First Lawsuit to provide sales projections for 20 films other than
4 BTL's film *Twiharder*. (Dkt. 75-33, pp. 17-26.)⁶

5 The Nash Financial Reports – produced by BTL four business days before the
6 close of discovery – confirm that Mr. Nash's testimony is subject to Fed.R.Evid.
7 702. According to the documents, Mr. Nash and his company, Nash Information
8 Services, LLC, have, since 1997, “developed its Movie Industry Model, a
9 sophisticated tool for analyzing past and future performance of movies, including
10 ancillary revenue through DVD and Blu-ray sales and rentals, TV sales, and foreign
11 revenues.” (Dkt. 75-33, p. 1.) The Nash Financial Reports identify, in basic terms,
12 what Mr. Nash refers to as the “Sales Projection Methodology,” which describes a
13 specialized methodology used to “produce a model of the financial performance of a
14 ‘typical’ movie of this type,” which apparently means a movie of *Twiharder*'s
15 “type.” (Dkt. 75-3, p. 2; *see also* Dkt. 75-3, p. 3 (estimates produced using “Nash
16 Information Services, LLC's analytical models”).)

17 Because any testimony provided or evidence created by Mr. Nash was done
18 after the fact, at BTL's request, and is based, not on Mr. Nash's rational perception
19 of the facts at issue, but instead on Mr. Nash's alleged specialized knowledge and
20 expertise, his testimony qualifies as expert opinion that should have been disclosed
21 under Fed.R.Civ.P. 26(a)(2). *See, e.g., Crime, Justice & Am., Inc.*, 2014 U.S. Dist.

22
23 ⁶ As far as Summit can tell, Mr. Nash was not aware that he was preparing
24 sales projections to establish BTL's lost profit damages. In fact, the Nash Financial
25 Reports appear to have been created for the purposes of presenting to potential
26 investors in *Twiharder*. (*See, e.g.,* Dkt. 75-33, p. 1 (“The projection both helps to
27 set expectations for investors, and is also useful when negotiating with potential
28 distributors.”).) Furthermore, the Nash Financial Reports make it clear that “the
sales projection is *not* a predication of how much a particular movie is going to
make.” (Dkt. 75-33, p. 4.)

1 LEXIS 141388, at **8-9 (“Plaintiffs concede their witnesses are being offered for
2 their extensive knowledge and backgrounds in law enforcement to conclude that
3 CJA does not pose a security risk to jails. Thus, these witnesses are expert
4 witnesses who employ specialized knowledge in their testimony. Specifically,
5 Kenneth Kerle and Daniel Vasquez have never observed CJA circulating in jails.
6 They do not have personal knowledge of its effects on jail security. They simply
7 base their opinions on a review of the publication.”); *Humboldt Baykeeper v. Union*
8 *Pac. R.R. Co.*, 2010 U.S. Dist. LEXIS 52182, at **4-5 (N.D. Cal. May 27, 2010)
9 (disclosure required where testimony not based on percipient knowledge but in on
10 witness’s expertise).

11 **2. BTL’s Failure To Disclose Mr. Nash As An Expert Witness**
12 **Is Not Substantially Justified Or Harmless**

13 There can be no dispute that BTL failed to disclose Mr. Nash. BTL cannot
14 meet its burden and prove that such failure to disclose was neither substantially
15 justified nor harmless.

16 **a. There is no Justification for BTL’s Failure to Disclose**
17 **Mr. Nash and the Nash Financial Reports under**
Fed.R.Civ.P. 26.

18 For the reasons stated above in Section III.A.II and Summit’s Motion *in*
19 *Limine* No. 1, BTL has no excuse for not disclosing Mr. Nash under Fed.R.Civ.P. 26.

20 **b. BTL’s Failure to Comply with Fed.R.Civ.P. 26 is not**
21 **Harmless; Rather it Substantially Prejudices Summit**

22 Trial is scheduled to begin on November 25, 2014, less than four weeks from
23 the date of this motion. Thus, even if the Court wanted to authorize Summit to take
24 Mr. Nash’s deposition or seek other related discovery, there is no time to do so
25 without a continuance. Even if this motion were heard and decided prior to trial,
26 and the Court decided to allow Summit to take expert discovery, Summit would still
27 have to prepare for an expert deposition while preparing for trial, and would also be
28 foreclosed from hiring, consulting and disclosing its own experts. In other words,

1 short of a long continuance of the trial date, there is no remedy for the prejudice
2 caused by BTL's failure to properly and timely disclose Mr. Nash and the Nash
3 Financial Reports. *See, e.g., Empresa Cubana del Tabaco v. Culbro Corp.*, 213
4 F.R.D. 151, 159-160 (S.D.N.Y. 2003) (excluding witnesses that were not properly
5 disclosed, in part, because "[t]he prejudice is not limited to the fact that the parties
6 would have to squeeze in two depositions in the two-month period before trial....
7 [I]t is clear that even the bare minimum of discovery required by fairness would at
8 the very least severely hamper trial preparation and likely could not be completed in
9 the two months before the trial is set to begin."). Courts routinely find prejudice in
10 these circumstances and excluded expert testimony. *See Yeti by Molly*, 259 F.3d at
11 1107 (9th Cir. 2001) ("Plaintiffs received Vuckovich's report one month before they
12 were to litigate a complex case. To respond to it, plaintiffs would have had to
13 depose Vuckovich and prepare to question him at trial. *See NutraSweet Co. v. X-L*
14 *Eng'g Co.*, 227 F.3d 776, 786 (7th Cir. 2000) ('Without even a preliminary or draft
15 supplemental expert witness report from [the expert], NutraSweet was greatly
16 hampered in its ability to examine him about his analysis of the site work. In these
17 circumstances, the use of the 'automatic' sanction of exclusion was not an abuse of
18 discretion.' (citations omitted)). We affirm the decision to exclude Vuckovich's
19 testimony."); *Tyco Thermal Controls, Inc. v. Redwood Industries, LLC*, 2012 U.S.
20 Dist. LEXIS 91598, at *7 (N.D. Cal. June 29, 2012) ("[G]iven that fact and expert
21 discovery have long since closed, coupled with the imminent trial date, it would be
22 unduly prejudicial to permit the trial testimony of these previously undisclosed
23 witnesses—none of whom Rowe has had the opportunity to depose."); *Internet*
24 *Servs. LLC v. Immersion Corp.*, 2008 U.S. Dist. LEXIS 120563, at **5-6 (N.D. Cal.
25 May 13, 2008) (excluding expert testimony based prejudice caused by delayed
26 disclosure); *Estate of Gonzalez*, 2007 U.S. Dist. LEXIS 84390, at **26-27 (C.D.
27 Cal. June 28, 2007) ("Even were Defendants to depose Hunt, moreover, this would
28 not cure the prejudice they have suffered. Deposing Hunt will not enable

Defendants to challenge, with documentary evidence or rebuttal expert testimony, the numerous assumptions underlying her calculation of Gonzalez's lost earnings potential. As a result, exclusionary sanctions pursuant to Rule 37(d)(1) are warranted."); *see also Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005) ("Disruption to the schedule of the court and other parties in that manner is not harmless."); *Allegro Ventures, Inc. v. Almquist*, 2014 U.S. Dist. LEXIS 64008, at **37-38 (S.D. Cal. May 8, 2014) (excluding three expert witnesses that plaintiff included on his witness list but failed to disclose pursuant to Fed.R.Civ.P. 26(a)(2)).

IV. CONCLUSION

For the above reasons, Summit's Motion *in Limine* No. 2 should be granted in its entirety, and Mr. Nash's testimony and the Nash Financial Reports and any testimony relating thereto should be excluded.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

Dated: October 28, 2014

By: /s/ Jill M. Pietrini

Jill M. Pietrini

Attorneys for Defendant and Counterclaimant

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1901 Avenue of the Stars, Suite 1600, Los Angeles, CA 90067-6055.

On October 28, 2014, I served true copies of the following document(s) described as **DEFENDANT AND COUNTERCLAIMANT SUMMIT ENTERTAINMENT, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE NO. 2 TO EXCLUDE FINANCIAL REPORTS BY NASH INFORMATION SERVICES, LLC AND ANY TESTIMONY THEREON** on the interested parties in this action as follows:

James H. Freeman, Esq.
J.H. Freeman Law
3 Columbus Circle, 15 FL
New York, NY 10019
Tel: (212) 931-8535
Fax: (212) 496-5870
james@jhfreemanlaw.com

Steve Lowe, Esq.
LOWE & ASSOCIATES, P.C.
11400 Olympic Boulevard, Suite 640
Los Angeles, CA 90064
Tel: (310) 477-5811
Fax: (310) 477-7672
steve@lowelaw.com

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 28, 2014, at Los Angeles, California.

/s/ Latrina Martin
Latrina Martin

SMRH:433627421.3